No. 17-7505

In The
Supreme Court of the United States

VERNON MADISON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Writ Of Certiorari To The Mobile County Circuit Court

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

Experts agree that Vernon Madison now sits on Alabama's death row unable to fully orient to time and place. Brain trauma as a result of multiple strokes has led to decreasing cognitive capabilities and reduced his intellectual functioning to the borderline range. It is undisputed that he suffers from varying degrees of disorientation and confusion about the world around him. He frequently urinates on himself and complains that no one will let him out to use the bathroom when there is a toilet inches away from his bed. His memory is so impaired that he can no longer recite the alphabet or do a simple math problem. He is unable to remember that his mother and brother are deceased and cannot identify the prison warden or officers who have been guarding him for years. Multiple strokes and brain injuries have left Mr. Madison nearly blind and he can no longer read or write; he often has difficulty speaking and his tangential and repetitive speech makes him difficult to understand. By every available measure, Mr. Madison's diagnosed dementia has compromised his cognitive functioning and rendered him unable to rationally understand his current circumstances and pending execution.

In the lower courts, Respondent argued that *Ford* relief was only available to prisoners who suffered from "delusions" or "psychosis" as a result of a mental illness, and that because Mr. Madison's claim was based on a diagnosis of dementia, he "failed to implicate *Ford v. Wainwright*, 477 U.S. 399 (1986), or *Panetti* [*v. Quarterman*, 551 U.S. 930 (2007),] in this

proceeding." (Doc. 8-2 at 140-41); *see also Madison v. Comm'r, Ala. Dep't of Corr.*, 851 F.3d 1173, 1188 (11th Cir. 2017) ("Rather, the State suggests that only a prisoner suffering from gross delusions can show incompetency under *Panetti*."). Respondent now appears to concede that dementia can be the basis for relief under *Ford* although that is not what the State argued to either the state or federal courts. Respondent's concession is significant because there is no dispute that Mr. Madison suffers from severe vascular dementia with acute features that leaves him unable to rationally understand the circumstances of his pending execution and the reasons for his confinement.

Vernon Madison suffers from a permanent and irreversible neurological condition. Without substantially addressing the facts of Mr. Madison's vascular dementia, Respondent nevertheless argues that protecting Mr. Madison from a cruel execution will circumscribe the State's sovereign power to "impose a just and constitutional punishment on a violent criminal who murdered one of the State's own law enforcement officers." Resp't Br. 1. But neither the facts surrounding Mr. Madison's conviction and sentence of death for the shooting death of Officer Julius Schulte nor the propriety of a death sentence when the victim is a law enforcement officer is at issue in this case.[1]

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[1] It is worth reemphasizing that in this case, the community – as represented by a jury of "seven (7) blacks and seven (7) whites," Resp't Br. 5 (citing *Madison v. Allen*, No. 09-00009-KD-B, 2013 WL 1776073, at *2 (S.D. Ala. Apr. 25, 2013)) – rejected the death penalty as the appropriate punishment and instead

The question of whether the Eighth Amendment prohibits the execution of the incompetent has already been resolved by this Court in *Ford v. Wainwright*, 477 U.S. 399, 410 (1986), and reaffirmed in *Panetti v. Quarterman*, 551 U.S. 930, 934 (2007). In those cases, the Court recognized that the Eighth Amendment places a substantive limit on a State's ability to execute a category of individuals defined by their mental disability. *See id.* ("[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." (quoting *Ford*, 477 U.S. at 409-10)). The Court's Eighth Amendment jurisprudence thus already embodies the way a just society treats people who are severely disabled by their mental status. This determination, however, is completely unrelated to the identity or status of the victim, the heinousness of the crime, or the propriety of the original sentence.

Moreover, the Eighth Amendment prohibition on the execution of incompetent prisoners does not negate the State's ability to punish but rather enforces the community's understanding of human dignity in the context of punishment. Nothing about the State's decision to charge, convict and severely punish criminal offenders, even seek the death penalty for those

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sentenced Mr. Madison to life without the possibility of parole. Judge McRae, the trial judge, rejected this life sentence, and, as he has done on five other occasions with five other life-sentenced defendants, *see* Equal Justice Initiative, *The Death Penalty in Alabama: Judge Override* 16 (2011), http://eji.org/sites/default/files/death-penalty-in-alabama-judge-override.pdf, he sentenced Mr. Madison to death. *Madison v. State*, 718 So. 2d 90, 94 (Ala. Crim. App. 1997).

convicted of killing a law enforcement officer, is implicated by this case. Rather, the question for the Court in this case is whether Mr. Madison, who suffers from the severe physical and cognitive deficits that reflect the progressive decline endemic to vascular dementia, should be shielded from an extreme punishment in the same way that our legal system shields such vulnerable individuals in other contexts. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 734-35 (1997) (State of Washington's ban on assisted suicide reasonably ensures against risk of abuse of "vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia").

For the reasons identified in Mr. Madison's principal brief as well as those stated below, this Court should reverse the lower court judgment.

ARGUMENT

I. Vernon Madison Suffers from a Verifiable and Confirmed Case of Vascular Dementia, and the Resulting Cognitive and Physical Disabilities Render Him Unable to Understand or Appreciate the Circumstances of His Pending Execution.

Vernon Madison suffers from a verifiable and confirmed case of vascular dementia. In its brief, Respondent essentially ignores the import of this diagnosis and instead focuses primarily on the assertion that a prisoner's inability to recall events in one's life,

including the circumstances surrounding the crime for which he is to be executed, is insufficient to establish incompetency under the dictates of *Ford* and *Panetti*. *See, e.g.*, Resp't Br. 2, 13, 15-16, 20-21. Supporting amici similarly focus almost exclusively on memory, arguing that the ability to recall details of the crime is not generally required for culpability purposes, Texas et al. Amicus Br. 5-7, and is even "less relevant in the execution context," *id.* at 8. But Mr. Madison is not challenging his culpability or even arguing that, standing alone, a simple memory deficit would necessarily place him under the protection of *Panetti*. Rather, it is the verifiable and uncontested diagnosis of vascular dementia, and the attendant and inevitable progressive decline that characterizes this permanent neurological disorder, that disables Mr. Madison.

As detailed in Mr. Madison's opening brief and the record aptly demonstrates, in this case, vascular dementia has manifested such that, as measured by every identifiable metric – physical, intellectual, and psychological – Mr. Madison's connection with the outside world has been severed so as to prevent him from understanding or appreciating the circumstances of his current execution, thus placing him in the category of prisoners for whom execution would constitute a "uniquely cruel penalty." *Ford*, 477 U.S. at 421 (Powell, J., concurring).

In addition to being legally blind, Mr. Madison's incontinence, inability to walk unassisted, and dysarthric or slurred speech are all symptoms characteristic of late-stage vascular dementia. Am. Psychological Ass'n

& Am. Psychiatric Ass'n Amicus Br. 9-10 [hereinafter "APA Br."]. He suffers from additional, chronic medical conditions – small vessel ischemia, occipital angioma – that continue to exacerbate his physical and cognitive decline. *See* Pet. Br. 8.

Likewise, Mr. Madison's intellectual deficits are apparent and undisputed, based largely on Dr. Goff's evaluation and neuropsychological testing: he now functions in the borderline range of intelligence with an IQ score of 72 and suffers from severe memory deficits, most clearly demonstrated in a Working Memory Score of 58, placing him "within the borderline to intellectually disabled range." (Doc. 8-3 at 17, 20 (expert report of Dr. Goff); Doc. 8-1 at 97-98 (4/14/16 hearing).) While important markers of the extent to which the cerebral trauma he has experienced have negatively impacted his cognitive abilities, these scores do not adequately capture the specific ways in which this disease has devastated Mr. Madison's abilities to make connections in his day-to-day interactions.

At a minimum, these deficits impair Mr. Madison's ability to interact with the world around him and he routinely exhibits profound confusion and disorientation. Drs. Goff and Kirkland noted that he was only *partially* oriented to time and place (Doc. 8-1 at 74-75 (hearing); Doc. 8-3 at 8 (expert report of Dr. Kirkland)), noting that he did not know the season, date or day of the week (Doc. 8-3 at 8 (Kirkland report); *see also* Doc. 8-3 at 16 (Goff report) (not oriented to day of month)). He had "some difficulty understanding" the reasons for Dr. Goff's evaluation (Doc. 8-3 at 15 (Goff report)), and

became confused when he reached the letter "G" while attempting to recite the alphabet (Doc. 8-3 at 16 (Goff report); *see also* Doc. 8-1 at 100 (hearing)). He is "unable to rephrase simple sentences" or "perform simple mathematical calculations" (Doc. 8-3 at 18 (Goff report)), could not "recall any out of 25 elements from a brief story vignette," and his "[l]ogical memory for verbal material was very poor" (Doc. 8-3 at 16 (Goff report)). When he was unable to recall the details or recount an incident he "confabulated some things," meaning that he "made stuff up to fill the gaps, which people with memory problems, that's what they do." (Doc. 8-1 at 100 (hearing).)

This profound disorientation and confusion manifest in other ways as well: struggling to retain basic information, repeatedly asking the same question, even when it had been answered, and increasingly focusing on a limited number of familiar topics. (Doc. 8-1 at 22, ¶ 13 (Affidavit of Ashley Edwards); Doc. 8-1 at 25, ¶ 8 (Affidavit of Jennae Swiergula).) He seemed unable to recognize his attorney over the phone or in person (Doc. 8-1 at 25, ¶ 6 (Swiergula affidavit)), and "could not remember his attorneys' names" during Dr. Goff's evaluation (Doc. 8-3 at 18 (Goff report)). He has also exhibited signs of confusion while communicating with his attorney, at one point asking a question about an in-person meeting he believed occurred the previous day, when in fact, his attorney had not seen him for several months. (Doc. 8-1 at 25, ¶ 7 (Swiergula affidavit).) During a legal visit in February 2016, he indicated confusion about the status of his case, stating

that he plans to move to Florida or live abroad after he is released from prison. *Madison*, 851 F.3d at 1179; (*see also* Doc. 8-1 at 24-25, ¶¶ 4, 9 (Swiergula affidavit)).

He "could not recall people and events that he had previously identified as being extremely significant to him." (Doc. 8-1 at 24, ¶ 5 (Swiergula affidavit).) He was unable to "retrieve his [father's] name" when speaking with Dr. Goff. (Doc. 8-3 at 15 (Goff report).) Notably, after returning from the hospital after his stroke, he repeatedly asked that his mother be notified, and had to repeatedly be told that he could not see her because she had passed away several years earlier. (Doc. 8-1 at 24, ¶ 5 (Swiergula affidavit); *see also* Doc. 8-1 at 101 (hearing); Doc. 8-3 at 19 (Goff report).) Similarly, he asked to see his brother, who had also died previously. (Doc. 8-1 at 101 (hearing); Doc. 8-3 at 19 (Goff report).)

This disorientation extends to confusion about his surroundings and hygiene-related tasks. *See* APA Br. 9. Mr. Madison reported frequently urinating on himself because "no one will let me out to use the bathroom," despite the fact that he has a toilet in his cell. *Madison*, 851 F.3d at 1179; (Doc. 8-1 at 22, ¶ 12 (Edwards affidavit)). Additionally, Mr. Madison has presented as increasingly and uncharacteristically disheveled, wearing a visibly soiled uniform, covered in stains and hair shavings, and on his bare feet, wearing plastic shower sandals that did not match. (Doc. 8-1 at 21-22, ¶ 11 (Edwards affidavit).) In subsequent visits, his hygiene continued to deteriorate. (Doc. 8-1 at 25, ¶ 10 (Swiergula affidavit).)

Mr. Madison's diagnosed vascular dementia, and the physical and cognitive deficits referenced here and in Mr. Madison's opening brief make clear that Respondent's attempt to pigeon hole this case as one that is only about Mr. Madison's "inability to recall his crime" or "amnesia" simply fails to account for the undisputed evidence in this case. *See, e.g.*, Resp't Br. 22, 30. By every available metric, Mr. Madison has and will continue to experience profound and progressive deterioration in his cognitive and physical functioning that fundamentally alters his ability to understand and connect the events in his life. *See* APA Br. 10 ("These deficits interfere with Mr. Madison's ability to form a rational understanding of his punishment and its relationship to his crime of conviction.").

II. The Inclusion of Individuals Suffering from Vascular Dementia in the Class of People for Whom Execution Would Constitute a Cruel and Unusual Punishment Does Not Alter the Analysis Established in *Ford* and *Panetti* or Otherwise Expand the Category of Individuals for Whom Execution Is Inappropriate.

Mr. Madison has consistently maintained that he is not competent to be executed because as a result of multiple, severe strokes, he suffers from vascular dementia and the corresponding physical and cognitive deficits that have impaired his ability to recall numerous events in his life, including the sequence of events from the offense, to his arrest, to his trial. Because he

can no longer understand or connect the underlying offense to his pending execution, he does not have the "rational understanding" required by *Ford* and *Panetti*, and his execution is therefore barred by the Eighth Amendment.

Despite this consistent claim, Respondent insists that Mr. Madison intends to "extend[ ] the doctrine of *Ford* and *Panetti*" to ban the execution of prisoners with "amnesia," Resp't Br. 39, and then spends considerable space and effort arguing that this "extension" is not supported by this Court's Eighth Amendment doctrine, Resp't Br. 41, and would result in "new opportunities for malingering and evasion," Resp't Br. 45, and an increase in "false claims, manipulation, and abuse," Resp't Br. 41.[2] But Respondent's arguments are both inaccurate and misleading.

Mr. Madison is not, in fact, arguing that this Court should shield him from execution based solely on a claim of simple amnesia, as Respondent suggests. Rather, Mr. Madison is asking this Court to recognize that a prisoner may be deemed incompetent under the analysis outlined in *Ford* and *Panetti* where, as here, the undisputed evidence establishes that Mr. Madison has been diagnosed with vascular dementia, a serious neurocognitive disorder, and that the cognitive and physical deficits associated with that disorder have

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[2] Likewise, Texas and states joining with Respondent argue that Mr. Madison seeks a "categorical rule." Texas et al. Amicus Br. 2 ("[D]ementia and other mental illnesses are too variable for a categorical rule like *Atkins*.").

rendered him unable to rationally understand his current circumstances.

As articulated in both Mr. Madison's opening brief and the supporting amicus brief of the APA, medical and scientific advancements have allowed for increased confidence in the diagnosis of mental disorders, such as dementia, that merit protection under the Eighth Amendment. These advancements include not only neuroimaging and brain-mapping techniques, *see* Pet. Br. 31-33, but "well-established procedures" including structured clinical interviews, consultation of collateral sources of information and treatment records, and cognitive tests, *see* APA Br. 14-16. Vascular dementia, in particular, has "several unifying characteristics, which allow for consistent diagnoses," APA Br. 7-8, made in reliance on history, physical examination and neuroimaging, Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 621-22 (5th ed. 2013) [hereinafter "DSM-5"].

In addition to the specific criteria necessary for a diagnosis of dementia or major neurocognitive disorder, *see* DSM-5 at 602, the etiological subtype of vascular dementia requires that the "onset of cognitive deficits [be] temporally related to one or more cerebrovascular events" or be "prominent in complex attention . . . and frontal-executive function," and that "[t]here is evidence of the presence of cerebrovascular disease from history," to include neuroimaging evidence of "large vessel infarcts or hemorrhages," a "strategically placed single infarct," "two or more lacunar infarcts outside the brain stem," or "extensive and

confluent white matter lesions." DSM-5 at 621-22. As such, dementia is verifiable in ways that other mental illnesses are not.

Not only are mental-health professionals adept at using both traditional tools and brain imaging to diagnose dementia, but in using these tools to identify persons who are malingering or otherwise feigning impairment.[3] APA Br. 16-17.

The only question in this case has been, and continues to be, whether dementia and its attendant cognitive deficits and memory impairments can render a prisoner incompetent under the rubric developed in *Ford* and *Panetti*.[4] Because the record undisputedly establishes that Mr. Madison is severely compromised by a verifiable neurological disease of vascular dementia, as well as brain injury, cognitive decline, memory loss and a diminished capacity to rationally understand

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[3] In this case, the experts agreed that Mr. Madison was not malingering his dementia and associated cognitive deficits. (Doc. 8-3 at 17 (Goff report); Doc. 8-3 at 9 (Kirkland report).)

[4] Up to this point, Respondent has answered a resounding "no" to that question, and the state trial court followed suit when it made no mention of Mr. Madison's diagnosed dementia anywhere in its 2016 order denying Mr. Madison's competency claim. (Doc 8-2 at 149-58.) While Respondent now claims to have previously argued that dementia could form the basis of an incompetency claim, Resp't Br. 23 n.4, the record contradicts Respondent on this point. *See Madison*, 851 F.3d at 1188 n.15 ("At oral argument, the State argued that a prisoner who has severe dementia that doesn't result in delusions but has completely obliterated his memory would be competent to be executed because the mere fact that a prisoner doesn't suffer from delusions means that he can form the rational understanding required by *Panetti*.").

what he is experiencing, the answer to that question must be yes.

III. A Finding that Mr. Madison Is Incompetent Does Not Implicate the State's Ability to Punish but Rather Enforces the Community's Understanding of Human Dignity in the Context of Punishment.

There is no question the Eighth Amendment ban on cruel and unusual punishments provides boundaries within which states must operate. *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding Eighth Amendment ban on "cruel and unusual punishment" extends to states). "While the State has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards." *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

In *Ford*, this Court recognized that the civilized standards embodied in the Eighth Amendment prohibited the execution of prisoners found to be incompetent. 477 U.S. at 409-10. In so holding, this Court did not find any fault with the general propriety of the death penalty or how it was imposed, but rather affirmed a principle embraced by all the states that executing an incompetent person served no useful penological purpose and diminished society's view of its own pursuit of justice. *Id.* at 406-09; *see also id.* at 419 (Powell, J., concurring).

Respondent and supporting amici nevertheless devote a significant portion of their briefing to arguments about the propriety of the death penalty in cases in which a law enforcement officer is killed and more specifically about Mr. Madison's culpability in this case.[5] *See, e.g.*, Resp't Br. 17 ("The Constitution affirms the sovereign power of the States to execute the worst murderers" and "the State has an especially strong interest" in executing those convicted of killing police officers), 38 ("He is fully culpable for his actions."); Texas et al. Amicus Br. 12 ("Because petitioner did not have dementia when he murdered a police officer and attempted to murder his ex-girlfriend, his culpability for those crimes is in no way diminished by his current state."). But the question before the Court – whether the Eighth Amendment prohibits the execution of a mentally disabled prisoner with severe cognitive deficits and neurological impairments as a result of vascular dementia – has nothing to do with culpability and does not negate the State's ability to punish. Mr. Madison has not and will not go unpunished. He has now been held in solitary confinement on death row for 33 years facing the constant threat of execution. He exists in a small cell where dementia has left him disoriented, confused, blind, incontinent, and unable to walk

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[5] The National Association of Police Organizations argues that enhanced penalties for those convicted of killing police officers are constitutional. *See, e.g.*, Nat'l Ass'n Police Orgs. Amicus Br. 12. Mr. Madison has never argued otherwise, and it is telling that nowhere in the organization's brief will this Court find a citation to *Ford* or *Panetti* and nowhere will it find the words "competence," "incompetent," or like.

while he questions the circumstances of his confinement and pending execution and asks to see relatives that have long been dead. Rather, this case has everything to do with how we treat individuals who have been rendered incapacitated by a mental disorder, development or disability.

The Court's holding in *Ford*, and later in *Panetti*, makes clear that the prohibition on executing an incompetent person does not turn on the nature of the offense for which the death sentence has been imposed. In *Ford*, for example, this Court never even elucidated the facts of the offense for which Mr. Ford was convicted. In fact, a jury found that "on July 21, 1974, Alvin Bernard Ford murdered a helpless, wounded police officer by shooting him in the back of the head at close range." *Ford v. Wainwright*, 752 F.2d 526, 526 (11th Cir. 1985) (per curiam), *rev'd*, 477 U.S. 399 (1986). Scott Panetti was convicted of killing his mother-in-law and father-in-law in front of his wife and daughter. 551 U.S. at 935-36. At no point did this Court question whether these facts were determinative of whether the Eighth Amendment permitted their execution despite evidence suggesting each was incompetent. *See also Stewart v. Martinez-Villareal*, 523 U.S. 637, 639 (1998) (noting without elaboration that petitioner was convicted of two counts of first-degree murder in holding his *Ford* claim was not a "second or successive petition" for AEDPA purposes).

Similarly, this Court's Eighth Amendment holdings in *Roper* and *Atkins* barring certain defendants from being sentenced to death contain no exemption

dependent upon the circumstances of the crime. *See Roper v. Simmons*, 543 U.S. 551, 572 (2005) (finding bar on execution of children while noting "we cannot deny or overlook the brutal crimes too many juvenile offenders have committed"); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (noting death penalty already confined to "a narrow category of the most serious crimes"). Likewise, despite Respondent's insistence to the contrary, *Ford*'s and *Panetti*'s prohibition on executing the mentally incompetent provides no exemption for an incompetent person to be executed if the State deems the prisoner to be the "worst murderer[ ]" or the case to be one in which the State "has an especially strong interest." Resp't Br. 17.

In addition, a finding that Mr. Madison's vascular dementia and severe cognitive and memory deficits render him incompetent to be executed will not curtail the states' powers to seek and impose death in any other case in which it is already able to do so. *Ford* did not end the death penalty, did not limit the crimes for which death can be imposed, and did not erect any bar on those who could be sentenced to death. Indeed, *Ford* still permits the execution of someone found incompetent so long as that person regains competence. *See* 477 U.S. at 425 n.5 (Powell, J., concurring) ("[I]f petitioner is cured of his disease, the State is free to execute him."); *see also Singleton v. Norris*, 319 F.3d 1018, 1027 (8th Cir. 2003) (en banc) ("A State does not violate the Eighth Amendment as interpreted by *Ford* when it executes a prisoner who became incompetent during his long stay on death row but who subsequently

regained competency through appropriate medical care."). Here, finding Mr. Madison incompetent based on his significant mental disabilities does not "interpos[e]" any additional step between conviction and execution, as the State alleges, Resp't Br. 39, because *Ford* and *Panetti* already establish that the Eighth Amendment requires, or "interposes" a requirement of, competence.

Mr. Madison has a verifiable neuropsychological disorder – vascular dementia as a result of several strokes – that impedes his ability to rationally understand what the State proposes to do to him and why it proposes to do it. This Court should affirm *Ford* and *Panetti* and find that Mr. Madison's execution is prohibited. 551 U.S. at 934 ("'[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.' The prohibition applies despite a prisoner's earlier competency to be held responsible for committing a crime and to be tried for it." (quoting *Ford*, 477 U.S. at 409-10)).

CONCLUSION

The judgment of the Mobile County Circuit Court should be reversed.

Respectfully submitted,

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